(4)

No. 91-1440

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

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SCHNABEL FOUNDATION COMPANY,
*Petitioner,*

v.

HARBOR INSURANCE COMPANY,
*Respondent.*

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**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

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## REPLY BRIEF OF PETITIONER

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## TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| INTRODUCTION | 1 |
| ARGUMENT | 2 |
| I. HARBOR'S OPPOSITION CONFIRMS THAT A MAJORITY OF OTHER CIRCUITS THAT HAVE DEALT WITH THIS ISSUE ADOPT THE "NO EVIDENCE" STANDARD OF REVIEW | 2 |
| II. HARBOR DOES NOT CORRECTLY INTERPRET *JOHNSON* AND *CONE*, NOR EFFECTUATE RULE 50(b), NOR RESPECT THE DIVISION OF RESPONSIBILITY BETWEEN APPELLATE AND TRIAL COURTS | 5 |
| III. HARBOR IS IN ERROR IN DEFENDING THE FAILURE OF THE COURT OF APPEALS TO INDEPENDENTLY REVIEW THE ENTIRE RECORD | 8 |
| IV. THE JURY INSTRUCTIONS AND THE CONCOMITANT JURY VERDICT WERE UNAMBIGUOUS | 8 |
| CONCLUSION | 10 |

## TABLE OF AUTHORITIES


| Cases: | Page(s) |
|---|---|
| **Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) | 9,10 |
| **Baltimore and Carolina Line v. Redman*, 295 U.S. 654 (1935) | 5 |
| *Berry v. United States*, 312 U.S. 450 (1941) | 5 |
| *Bielevicz v. Dubison*, 915 F.2d 845 (3d Cir. 1990) | 2 |
| *Charles Jacquin Et Cie v. Destileria Serralles*, 921 F.2d 467 (3d Cir. 1990) | 3 |
| **Cone v. West Virginia Pulp and Paper Co.*, 330 U.S. 212 (1941) | 3,6 |
| *Danielson v. City of Lorain*, 938 F.2d 681 (6th Cir. 1991) | 2 |
| *Gairola v. Com. of Virginia Dept. of General Services*, 753 F.2d 1281 (4th Cir. 1985) | 2 |
| *Galloway v. United States*, 319 U.S. 372 (1943) | 5 |
| *Hulson v. The Atchison Topeka and Santa Fe Railway Company*, 289 F.2d 726 (7th Cir. 1961) | 6 |
| **Johnson v. New York, N.H. & H.R.R.*, 344 U.S. 48 (1952) | 3,4,6,7 |
| *Leishman v. Associated Electric Co.*, 318 U.S. 203 (1942) | 6 |
| *Lenard v. Argento*, 699 F.2d 874 (7th Cir. 1983), *cert. denied*, 464 U.S. 815 (1983) | 2 |
| **Los Angeles v. Heller*, 475 U.S. 796 (1985) | 9 |
| **Miller v. Avirom*, 384 F.2d 319 (D.C. Cir 1967) | 7 |
| *Northern Pacific Railway v. North Dakota*, 236 U.S. 585 (1915) | 8 |
| *Safeway Stores v. Coe*, 136 F.2d 771 (D.C. Cir. 1945) | 6 |
| *Taylor v. Freeland & Kronz*, ___ U.S. ___, (Slip Op. No. 91-571, decided April 21, 1992) | 7 |
| *Woods v. National Life and Accident Ins. Co.*, 347 F.2d 760 (3d Cir. 1965) | 3 |

## Table of Authorities Continued


| | Page |
|---|---|
| **Constitutional and Statutory Authorities:** | |
| U.S. Const. Amend. I | 8 |
| *U.S. Const. Amend. VII | 8,10 |
| Federal Rules of Appellate Procedure, Rule 35 | 5 |
| Federal Rules of Civil Procedure: | |
| Rule 6 | 6 |
| *Rule 50 | 4-6 |
| **Treatises:** | |
| 9 C. Wright & A. Miller, Federal Practice and Procedure (1971 & Supp. 1991) | 4 |


*Authorities principally relied upon by petitioner.

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## REPLY BRIEF OF PETITIONER

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## INTRODUCTION

This reply is necessary to address certain perceptions of your petitioner that the brief in opposition contains misstatements and/or misunderstandings of the facts and law which bear on the issues of this case. Additionally, the brief in opposition, taken as a whole, supports petitioner's principal contention that a serious conflict exists among the circuits as to the correct standard of appellate review to be applied in cases in which a motion for j.n.o.v. is not filed.

## ARGUMENT

### I. HARBOR'S OPPOSITION CONFIRMS THAT A MAJORITY OF OTHER CIRCUITS THAT HAVE DEALT WITH THIS ISSUE ADOPT THE "NO EVIDENCE" STANDARD OF REVIEW

Upon analysis, Harbor's opposition confirms that a majority of other circuits that have dealt with this issue adopt the "no evidence" standard of review. Those Circuits are: First, Second, Third, Sixth, Seventh, Eighth and Federal. [*See* Pet. at 10-12] The Circuits that have adopted or suggested a contrary view are: District of Columbia, Fifth, Tenth, and Eleventh.[1]

Harbor's listing of cases [Opp. at 8-9] to support the proposition that "courts generally will review the sufficiency of the evidence when ruling on the propriety of a decision denying a motion for directed verdict" is irrelevant. The only cases that are relevant are those which deal with the standard of appellate review of a jury verdict when *no* timely motion for j.n.o.v. is filed.

Furthermore, Harbor includes in its listing cases in which a motion for directed verdict was *granted*, which further demonstrates their irrelevance. *See Bielevicz v. Dubinon*, 915 F.2d 845 (3rd Cir. 1990); *Gairola v. Com. of Virginia Dept. of General Services*, 753 F.2d 1281 (4th Cir. 1985); *Danielson v. City of Lorain*, 938 F.2d 681 (6th Cir. 1991); *Lenard v. Argento*, 699 F.2d 874 (7th Cir.), *cert. denied*, 464 U.S. 815 (1983).

Harbor's division of cases into categories [Opp. at 10-12] does not offset the fact that there is a conflict and, further, that the majority of the circuits that have spoken to this issue have adopted the no evidence standard.

*First Category.* "Where the party seeking reversal had not filed a motion for directed verdict at the close of all the evidence." [Opp. at 10] The relevant consideration is

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[1] Harbor's count [Opp. at 9] is in error; however even Harbor's erroneous count demonstrates a serious conflict in the circuits.

not whether a motion for a directed verdict was filed, but whether the court of appeals relied upon the absence of a timely motion for j.n.o.v. to foreclose appellate review on the basis of the sufficiency of the evidence. When parties and subsequent panels ascertain the law in a circuit, they must look to the factors specified by a decision as influential, not on factors that are merely contained in the record.

*Second Category.* "Where appellants were seeking directed verdicts in their favor. . . ." [Opp. at 11]

Harbor's characterization of *Woods v. National Life and Accident Insurance Company*, 347 F.2d 760 (3rd Cir. 1965) is misleading and further misstated, as shown by the following quotation from that decision:

> By analogy we will treat defendant's present request as though it were one for a direction to enter judgment n.o.v. Under the circumstances of this case we may not grant defendant's request. *A party's failure to file a motion for judgment n.o.v. in the trial court precludes an examination of the record by that court or this court for the purpose of ascertaining whether that party was entitled to a directed verdict. Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48, 73 S.Ct. 125, 97 L.Ed. 77 (1952). Also see 5 Moore's Federal Practice (2nd ed.) ¶ 50.11.

347 F.2d at 769 (Emphasis added).

The same misstatement is true in Harbor's reference to *Charles Jacquin Et Cie v. Destileria Serralles*, 921 F.2d 467, 475 (3rd Cir. 1990).

*Third Category.* "Where there was no discussion of whether appellants had moved for a directed verdict." [Opp. at 11] If decisions do not discuss whether appellants had moved for a directed verdict, the law in these circuits necessarily rests on the failure to file a timely motion for j.n.o.v. because that is the issue discussed. Thus, Harbor effectively concedes that the Second, Sixth and Eighth Circuits conflict with the decision of the court below.

*Fourth Category.* "Where rulings were based on Supreme Court decisions which cannot be read to support the rulings. . . ." [Opp. at 12] The fact that Harbor does not agree with the Eighth Circuit's reading of *Johnson v. New York, N.H. & H.R.R.*, 344 U.S. 48 (1952) and *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947) does not diminish the need for review by this Court; such disagreement *enhances* the need for resolution of the conflict in the circuits. Not only do the circuits differ among themselves, but the difference is predicated on the force to be given to this Court's decision in *Johnson*. As Schnabel has shown in its petition and further shows below, neither the court of appeals nor Harbor gives effect to the reasoning of *Johnson* and *Cone*.

It is interesting that Harbor states:

> As the Circuit Court stated, regardless of whether a motion J.N.O.V. is made, the proper standard of review for a directed verdict motion is the same in both the trial court and on appeal—whether there is sufficient evidence to present a jury question—and to require the appellate court to only look to see whether there was *absolutely* no evidence to go to the jury is against the vast weight of authority. Slip Opinion ("Slip Op.") at 10-11, *citing* 9 C. Wright & A. Miller, *Federal Practice and Procedure*, 2524 at 541-543 and cases cited nn. 30-31 (1971 and Supp. 1991). [Opp. at 8 (emphasis in original and footnote omitted)]

However, Schnabel has pointed out that the section of Wright & Miller in question, and the cases cited therein, do not deal with or consider the standard of appellate review to be applied where the party seeking such review has made a motion for a directed verdict, but has failed to preserve its motion under Rule 50(b), by filing a timely motion for j.n.o.v. [Pet. at 13][2]

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[2] Harbor refers to the "*en banc*" nature of the decision of the court below. [Opp. at 5; *see also Id.* at 19] Actually, the purportedly "*en banc*" nature of the decision adds to the defective appellate procedure

## II. HARBOR DOES NOT CORRECTLY INTERPRET *JOHNSON* AND *CONE*, NOR EFFECTUATE RULE 50(b), NOR RESPECT THE DIVISION OF RESPONSIBILITY BETWEEN APPELLATE AND TRIAL COURTS

Harbor asserts that "there is no logical rationale for tying the standard of review to a perfunctory motion J.N.O.V. . . ." [Opp. at 6] "[T]here is nothing intrinsic to a motion J.N.O.V. which, in itself, should alter the standard of review." [*Id.*] "The Circuit Court ruled that one, and only one, standard was appropriate, particularly when, as in this case, a motion J.N.O.V. would have been frivolous or futile, or both." [*Id.*]

These assertions are inconsistent with Rule 50. They ignore constitutional limitations on post-verdict review of a directed verdict motion which led up to the promulgation of Rule 50. *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 659 (1935); *see also Berry v. United States*, 312 U.S. 450 (1941); *Galloway v. United States*, 319 U.S. 372 (1943). These assertions also contradict *Johnson* and *Cone*. They do not respect the proper relationship between trial and appellate courts.

The court of appeals took note of the recent amendments to Rule 50, but did not realize that the amendments perpetuated the necessity of filing a Rule 50(b) motion. Thus, the Notes of the Advisory Committee on the 1991 Amendment to Rule 50 state:

> Paragraph (a)(2) retains the requirement that a motion for judgment be made prior to the close of the trial, *subject to renewal after a jury verdict has been rendered*. (Emphasis added)

The Notes further state, with respect to Rule 50(b):

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in this case. Circulating a decision to all the judges is palpably unavailing as a substitute for genuine *en banc* review, and avoids the rule of uniformity of decisions within the circuit that one panel should not overturn a contrary ruling of a previous panel of the court, except when the court *en banc* approves pursuant to Rule 35(a)(1), Fed. R. App. P.

> This provision retains the concept of the former rule that the post-verdict motion is a *renewal* of an earlier motion made at the close of the evidence. (Emphasis added)

There would be no reason to include a requirement that is merely "perfunctory." Moreover, it is difficult to understand how the approach of the court of appeals would operate in practice. The district court only has jurisdiction over the case for ten days, and ten days is the period of time for seeking j.n.o.v. Must the district judge assume that a motion for j.n.o.v. is being filed in every case in which a motion for directed verdict is made at the close of all evidence and decide whether or not to set aside the verdict for insufficiency of the evidence? If so, what is the role played by the requirement that a motion for j.n.o.v. must be filed within the ten day period?[3]

Clearly a motion for j.n.o.v. is not "perfunctory." As *Cone* pointed out:

> [d]etermination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate transcript can impart.

330 U.S. at 216.

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[3] The judgment in this case was entered on July 2, 1990. Under Rule 6(a) of Fed. R. Civ. P. the ten days allowed Harbor within which to file its motion for j.n.o.v. ran on July 17, 1990. Harbor's j.n.o.v. motion was not filed until August 17, 1990. The ten-day filing requirement under the above-quoted rules is mandatory and jurisdictional to insure the finality of judgments and could not be extended by the district court. *Hulson v. the Atchison Topeka and Santa Fe Railway Company*, 289 F.2d 726, 729 (7th Cir. 1961). The rule laid down in *Hulson, supra*, is bottomed on this Court's cases of *Johnson v. New York, NH. & H.R. Co.*, 344 U.S. 48, 50 (1952) and *Leishman v. Associated Electric Co.*, 318 U.S. 203, 206 (1942); and it was previously adopted in the District of Columbia Circuit in *Safeway Stores v. Coe*, 136 F.2d 771, 775 (D.C. Cir. 1943).

In brushing aside the significance of a district court ruling on a motion for j.n.o.v., Harbor completely misunderstands the respective roles of trial and appellate courts. *See Miller v. Avirom*, 384 F.2d 319 (D.C. Cir. 1967). [Pet. at 17-18]

In addition, the circumstances of this case show that a motion for j.n.o.v. would not have been perfunctory. The district judge may have found the evidence sufficient to go to the jury. In that event, his articulation would have been of assistance to the appellate court. Assuming *arguendo* the district judge had found the evidence insufficient, he would have ruled on the ambiguity or non-ambiguity of the jury verdict. If the district judge found the verdict ambiguous and the evidence insufficient, he could have ordered a new trial. Therefore, the district judge's ruling would have obviated the need for an appeal, or would have been likely to facilitate judicial review.

Although Harbor claims that a motion for j.n.o.v. would have been futile, it nevertheless *did* file a motion for j.n.o.v., but an untimely one.[4] Presumably, the filing did not seem futile to Harbor at the time.

We need not belabor Harbor's misreading of *Johnson*. Suffice it to note that *Johnson* held that:

> Rule 50(b) rejected the New York procedure in the *Redman* case which permitted judgments to be set aside even though no motion to do so had been filed after verdict.

344 U.S. at 52. [*See also* Pet. at 16]

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[4] This Court very recently noted in *Taylor v. Freeland & Kronz*, ___ U.S. ___ (Slip Op. No. 91-571, decided April 21, 1992) that:

> Taylor cannot contest the exemption at this time whether or not Davis had a colorable statutory basis for claiming it.
>
> Deadlines may lead to unwelcome results, but they do prompt parties to act and they produce finality.

*Id.* at 5.

## III. HARBOR IS IN ERROR IN DEFENDING THE FAILURE OF THE COURT OF APPEALS TO INDEPENDENTLY REVIEW THE ENTIRE RECORD

Harbor's argument is that the court of appeals was not required to independently *review the entire record,* and that, in any event, petitioner does not show that the court of appeals failed to conduct such independent review of the entire record. [Opp. at 18] Harbor asserts that the obligation to conduct independent review of the entire record is limited to protection of the First Amendment. [Opp. at 18]

As revered as the First Amendment is, it is not the only constitutional value enshrined in our polity's cherished rights. We need not repeat a recitation of the jealous protection this Court has afforded to the right to a jury trial. [See Pet. at 19-20]

Harbor misses the mark in dismissing the significance of *Northern Pacific Railroad v. North Dakota,* 236 U.S. 585 (1915). [Opp. at 18] Schnabel went to great length in its petition to trace back the obligation to independently review the *entire record.* [*See* Pet. at 21-22] The source of the obligation was *not* in the protection of First Amendment rights, but in more general protection of federal rights. Therefore, *Northern Pacific* is highly pertinent, and obliges an appellate court to refrain from violating the right to a jury trial by means of *truncated review of the record.*

The short answer to Harbor's contention that Schnabel has not shown that the court of appeals violated its obligation, is that the failure is clearly documented in the petition at 23-24. [*See also* Pet. at 25-28]

## IV. THE JURY INSTRUCTIONS AND THE CONCOMITANT JURY VERDICT WERE UNAMBIGUOUS

If the jury verdict unambiguously showed that the jury ruled in Schnabel's favor irrespective of the issue of contributory negligence, then it necessarily follows that the court of appeals violated the Seventh Amendment by de-

nying Schnabel its verdict. Examination of the jury instructions demonstrates that the issue of contributory negligence was moot in light of the verdict. [*See* Pet. at 23-24] Harbor's cryptic and opaque response [Opp. at 20-21] is insufficient to refute petitioner's showing.

This Court in *Los Angeles v. Heller*, 475 U.S. 796 (1985), lends further support to petitioner's position. This Court held as follows:

> Respondent contends in his brief in opposition to certiorari that even though no issue of qualified immunity was presented to the jury, the jury might nonetheless have considered evidence which would have supported a finding of such immunity. *But the theory under which jury instructions are given by trial courts and reviewed on appeal is that juries act in accordance with the instructions given them*, see *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 604 (1985), and that they do not consider and base their decisions on legal questions with respect to which they are not charged. *We think that the Court of Appeals' search for ambiguity in the verdict was unavailing;* as that court itself noted later in its opinion, "[b]ecause the instructions required a verdict for [respondent] if *either* the due process *or* the excessive force claim was found, the jury's verdict for the defendant required a negative finding on both claims." 759 F.2d, at 1374 n. 3. *This negative, it seems to us, was conclusive* not only as to Officer Bushey, but also as to the city and its Police Commission.

475 U.S. at 798, 799. (Emphasis added and emphasis in the original.)

Additionally, an examination of *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), *supra*, and a comparison of it with the issues presented here is particularly relevant. *Aspen* holds:

> [W]e must interpret the *entire record* in the light most favorable to Highlands and give to it the benefit of

> all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn. . .
>
> Moreover, *we must assume that the jury followed the court's instructions. The jury must, therefore, have drawn a distinction.* . . Since the jury was unambiguously instructed. . . .

*Id.* at 604.

Finally, this Court in *Aspen, supra*, noted:

> . . .that the evidence [entire record] amply supports the verdict under the instructions as given by the trial court. . . .

*Id.*, note 44 at 611.

In this case, the court below not only has violated your petitioner's rights under the Seventh Amendment, but also has failed to follow the dictates of this Court pertaining to examination of the entire record under the assumption that the jury followed unambiguous jury instructions in rendering its verdict.

## CONCLUSION

WHEREFORE, this Court should grant the petition for certiorari.

Respectfully submitted,

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